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BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF THE COMMISSION STAFF REQUESTING THAT THE COMMISSION INVESTIGATE THE BUY-BACK RATE IN THE LETTER AGREEMENT ENTERED INTO BY IDAHO POWER COMPANY AND ASTARIS LLC.	**CASE NO. IPC-E-01-43** **POST-HEARING BRIEF OF ASTARIS**

Astaris LLC, Astaris Idaho LLC and FMC Corporation (collectively "Astaris"), by and through their attorneys hereby submit this Post-Hearing Brief.

In summary, applying the law in Idaho to the evidence presented at hearing, the

Idaho Public Utilities Commission ("Commission") may not modify the prices set in the Letter Agreement between Astaris and Idaho Power Company.

In Ruling On This Case, The Commission Must Act Within the Limited Scope Of Its Legal Authority.

"[A] public service commission has no inherent power; its powers and jurisdiction derive entirely from the enabling statutes creating it and 'nothing is presumed in favor of its jurisdiction.'" *United States v. Utah Power & Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977) (quoting *Arrow Transp. Co. v. Idaho Public Utilities Comm'n*, 85 Idaho 307, 379 P.2d 422, 425 (1963)). A Commission cannot confer jurisdiction upon itself simply by asserting that such jurisdiction exists. *Albert v. Boise Water Corp.*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990).

In exercising its jurisdiction, the Commission is obligated to regularly pursue its authority and not violate or impair any right of a person under the Constitution of the United States or of the state of Idaho. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). Further, the Commission must make findings that are supported by substantial, competent evidence and not contrary to the clear weight of the evidence. *Id.* Finally, the Commission is charged to neither abuse its discretion nor act in an arbitrary or capricious manner. *Id.*

Under Idaho Law The Commission May Not Abrogate Utility Contracts Other Than Contracts Setting Retail Rates.

The Staff of the Idaho Public Utilities Commission ("Staff") argues that the Commission's authority to abrogate the prices in the Letter Agreement arises out of the Commission's authority over retail rates. See Staff's Response to Astaris' Motion to Dismiss and Brief on Commission Authority at 8 (citing *Sandpoint Water & Light Company v. City of Sandpoint*, 31 Idaho 498, 173 P.2d 972 (1918); *Agricultural Products Corporation v. Utah Power & Light Company*, 98 Idaho 23, 552 P.2d 617 (1976)). However, no authority has been cited or exists for the proposition that the Commission may abrogate anything other than a retail rate paid by a consumer. The prices at issue here are not retail rates, but rather are utility costs or expenditures. The Commission's authority over a utility's expenditures, as opposed to retail rates, is expressly limited to determining whether such expenditures are prudent and, therefore, recoverable from ratepayers.

> The determination of what business expenses are to be incurred by a public utility in its operations is ordinarily a matter left within the discretion of the utility's management. An inquiry into such expenses by the Commission will normally only be extended into whether such expenditures may be classified as "operating expenses" and thus passed on to the utility ratepayers.

Washington Water Power Co. v. Kootenai Envtl. Alliance, 99 Idaho 875, 880, 591 P.2d 122, 127 (1979).

The Letter Agreement is an amendment to the Electric Service Agreement ("ESA") between Astaris and Idaho Power, and the ESA is a contract for a retail rate. However, those two facts alone are insufficient to support a conclusion that

the price set in the Letter Agreement is a retail rate. The evidence in this proceeding reveals the following:

- The Letter Agreement requires Idaho Power to pay a price to Astaris, while retail rate contracts require customers to pay the utility. *See* Staff Exhibit 111.
- The Letter Agreement was expressly approved as a system resource, thereby becoming a component of Idaho Power's cost of service. As such, Idaho Power's expenditures under the Letter Agreement are flowed through Idaho Power's Power Cost Adjustment ("PCA") like all other costs of producing or purchasing power. *See* Order No. 28695, Case No. IPC-E-01-9.
- The payments to Astaris were not dependent on the Commission approving the Letter Agreement for use on-system because, had the Commission elected otherwise, Idaho Power would have still made the agreed-upon payments to Astaris to use the resource off-system. *See* Transcript at 349.
- The Commission approved the recovery of Idaho Power's expenditures under the Letter Agreement through the PCA because they were reasonable compared to other power supply alternatives available at the time. *See* Order No. 28695, Case No. IPC-E-01-9. In contrast, retail rate contracts are approved where the rates are just and reasonable and provide a reasonable opportunity for the utility to recover the costs of providing power.

- Even now, the Staff is in effect conducting an ongoing prudence review to analyze the costs of the Letter Agreement against other power supply alternatives based on the current market price for power. The Staff's analysis is not based on whether the retail rate in the Letter Agreement provides a reasonable opportunity for the utility to recover its costs of providing power, the only analysis that would make sense if the price in question were a retail rate. *See* Transcript at 55-59.

Regardless of the form of the Letter Agreement, in substance the price set in the Agreement does not operate as a retail rate, has not been treated as a retail rate, was not approved on the same basis as a retail rate, and, even now, is not being evaluated as a retail rate would be. Staff witness Mr. Hessing put it succinctly: the retail rates set by the ESA are "there for another reason, a completely separate reason from the rates that Astaris would be paid for the power that they are selling back to Idaho Power and the power that's being supplied in the load-reduction agreement." Transcript at 172, l. 21 to 173, l. 2.

Whatever else it may be, the price to be paid Astaris under the Letter Agreement is not a retail rate. Since under *Agricultural Products* the Commission has authority only to abrogate a retail rate, the Commission does not have the authority to abrogate the price set in the Letter Agreement.

The Commission May Abrogate Retail Rates Only To The Extent Permitted By The *Agricultural Products* Decision.

As noted, *Agricultural Products* simply does not apply here. However, assuming, for purposes of argument, the Commission is found to have legal authority to abrogate the price set in the Letter Agreement, the Staff has failed to meet its burden of going forward and the burden of proof to present the substantial and competent evidence required by *Agricultural Products* to support a decision to abrogate the price in the Letter Agreement.

The Idaho Supreme Court has ruled abrogation is permitted only upon a finding that the rate would "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Agricultural Products* at 623. Abrogation must be limited to the minimum action necessary to achieve its objective. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 30, 97 S.Ct. 1505, 1522, 52 L.Ed.2d 92 (1977) ("a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well.").

The Staff argues that two of the three prongs of *Agricultural Products* are met in this case: that the Letter Agreement creates an excessive burden on other ratepayers or is unduly discriminatory. Transcript at 60. There has been no allegation or evidence that the Letter Agreement impairs the financial ability of Idaho Power to continue service. Further, as a preliminary matter, if Staff's analysis is correct that the Commission's authority to abrogate the Letter Agreement is a specific function of the reservation of authority in the underlying ESA, that reservation was limited to insuring that the contract did not harm other

ratepayers. *See* Response to Astaris' Motion to Dismiss and Brief on Commission Authority at 11. Therefore, under the Staff's own analysis, the Commission only reserved the ability to consider the first prong of the *Agricultural Products* test, and Staff's assertion that the Letter Agreement is unduly discriminatory should also be disregarded.

No Excessive Burden.

The Letter Agreement does not create an excessive burden on Idaho Power's ratepayers. The Letter Agreement establishes a fixed price per MWh for a fixed term of two years. *See* Staff Exhibit 111. Such a contract has advantages and disadvantages that were clearly understood at the time the Letter Agreement was implemented. The advantage of a long-term fixed price contract is that it acts as an insurance policy against the possibility of rising market prices. The disadvantage, expressly recognized by the Staff at the time, is that it does not permit the utility and its ratepayers to take advantage of falling prices.

With all these facts in mind, the Commission, the Staff, Idaho Power and Astaris all came to the conclusion that was in the public interest to approve the two-year buy-back contract with a fixed schedule of prices for use by Idaho Power ratepayers as a system resource. *See* Order No. 28695, Case No. IPC-E-01-9. At hearing, Mr. Hessing agreed that the amount ratepayers would pay if the Letter Agreement were honored is exactly the same now as was contemplated at the time it was approved. Transcript at 125, l.24. Therefore, since the Letter Agreement was not excessive then, and still imposes no new or additional burden, it cannot somehow create an excessive burden now.

Ignoring the advantages of a fixed-price long-term contract the Staff once touted, the Staff now argues that the Letter Agreement somehow creates an excessive burden because of the decline in the wholesale market prices of electricity since the Agreement was executed. Transcript at 126, l.24 to 127, l. 2. A mere change in wholesale market prices cannot create an excessive burden on ratepayers. Retail rates in a regulated environment are not linked to wholesale market prices. For a retail rate to create an excessive burden as contemplated by *Agricultural Products,* there must be a change in the utility's costs that imposes a new and additional burden on other customers. Here there is no change in the cost initially approved, but merely a change in wholesale market prices.

To illustrate the circumstances under which abrogation is allowed by *Agricultural Products*, consider the following examples. First, assume that a utility is experiencing rising costs. In this instance, the inability of the utility to assess a portion of these rising costs to a special contract customer may create an excessive burden on the other ratepayers who must make up the difference. Conversely, assume that a utility is experiencing falling costs. In this instance, if a special contract customer's rates fall faster than the rates paid by other ratepayers, that fact may create an excessive burden. But, if a utility's retail cost of service does not change from what was already anticipated and approved (as here), there can be no excessive burden created that warrants abrogation under *Agricultural Products*.

While Staff has established that wholesale market prices have changed, they offered no evidence that this changed Idaho Power's relevant costs. To the

contrary, as to the specific component of Idaho Power's costs at issue - the prices in the Letter Agreement - Staff agrees that there has been no change to Idaho Power's costs despite the change in market prices. Transcript at 129, ll. 12 to 16. Since the utility and ratepayer costs have not changed from the amounts initially approved, an excessive burden cannot since have been created, regardless of any changes in wholesale market prices.

Not Unduly Discriminatory.

Assuming, again for purpose of argument, the Commission has the authority to consider Staff's assertion that the Letter Agreement is unduly discriminatory, Staff has nevertheless failed to meet its burden of proof. Most significantly, Mr. Hessing acknowledges that "hundreds" of irrigators were offered and accepted load reduction agreements at prices exceeding those to be paid to Astaris. Transcript at 117, ll. 1 to 2; 118, l. 12. While the Astaris Letter Agreement is for a longer term than the irrigators' contracts, Mr. Hessing agreed that the Astaris load reduction was more dependable than the reductions offered by the irrigators. Transcript at 116, l. 24 to 117 l. 2. Further, the Letter Agreement is not unduly discriminatory because Astaris has incurred substantial costs to implement its part of the deal.[1] Based on these facts, there is no evidence to support a conclusion that the Letter Agreement is unduly discriminatory.

[1] The estimates presented of costs incurred by Astaris ranged from $23.7 Million to $90 Million. ranscript at 509; 368. The difference between the two numbers is largely a function of whether you consider the costs from an economic perspective as suggested by Ms. Carlock or an accounting perspective as suggested by Ms. McCarvill. In either case, the amount of money spent to implement the Letter Agreement by Astaris was substantial and must be considered in any analysis of whether the Letter Agreement was unduly discriminatory.

Mr. Hessing's assertion that the Letter Agreement is somehow unduly discriminatory is based solely on his claim that a "windfall" is created by the difference between wholesale market prices and the prices in the Letter Agreement. Transcript at 68. Such a "windfall" analysis is not relevant in this case. When the Letter Agreement was approved, Astaris' profits or losses were not an issue and they should not be an issue today. Instead, the focus was on the costs to Idaho Power to obtain the power and the corresponding revenue stream to Astaris. However, if the Commission considers the "windfall" issue relevant, the drop in wholesale market price cannot, by itself, be sufficient. The law cited by Staff in arguing that "windfalls" are relevant provides only that a State may "'restrict a party to those gains reasonably to be expected from the contract' when it was adopted." *United States Trust Co.* at 31, citing *El Paso v. Simmons*, 379 U.S. 479, 85 S.Ct. 577, 13 L.Ed.2d 466 (1965). Applying Staff's own standard, since upholding the Letter Agreement will result in Astaris being left only with those revenues expected when the contract was executed and no more, there is no "windfall." Transcript at 131, ll. 5 to 11.

If The Commission Abrogates The Letter Agreement, It Must Impair The Contract Only The Minimum Amount Required.

Even if it is found the Commission has the authority to abrogate the Letter Agreement, in exercising such authority the Commission may abrogate a contract only to the limited extent necessary to accomplish its objective. *United States Trust Co.* at 30. This principle applies in two ways: (1) the Commission may abrogate the prices in the Letter Agreement only to the extent Idaho Power's

Idaho ratepayers are impacted, and (2) the Commission must not lower the price farther than the minimum amount necessary to moderate any excessive burden on ratepayers.

As to the first issue, Mr. Hessing testifies that there is no benefit to Idaho ratepayers from abrogating the $14 Million in payments due to Astaris under the Letter Agreement that are not paid by Idaho jurisdictional ratepayers. Transcript at 170, ll. 4 to 9. This is because non-jurisdictional interstate and Oregon customers bear 15 percent of the costs and Idaho Power shareholders bear 10 percent of the costs. Since the Staff is proceeding under the two prongs of the *Agricultural Products* test that relate specifically to the protection of Idaho ratepayers, there is no legal basis to abrogate the $14 Million borne by others. Transcript at 60.

As to the second issue, Mr. Hessing testified that his proposal of $25 per MWh is not a ceiling and admitted it is lower than the lowest price that would create an excessive burden. Transcript at 179, ll. 19 to 24. While Mr. Hessing did not provide evidence of a specific price at which the Letter Agreement became an excessive burden, he agreed that such a price was higher than $25 per MWh.

The only other evidence in the record relevant to this issue is that the prices actually paid by Idaho Power ratepayers for power from QFs was over $60 per MWh in 2001 and the prices paid for purchased power generally was roughly $92 per MWh in 2000. Transcript at 197; 202. Therefore, if the Commission is found to have the authority to abrogate the Letter Agreement, to comply with the

law the Commission must not lower the prices in the Letter Agreement any further than the minimum amount required to avoid an excessive burden. Since there is no record evidence that the $92 per MWh already paid by and approved for Idaho Power ratepayers for purchased power created an excessive burden, any new Astaris price should be no lower than that figure.

The Commission May Not Violate The Prohibition Against Retroactive Ratemaking.

As previously briefed, if the Commission abrogates the Letter Agreement, it must only do so prospectively. *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 107 Idaho 47, 52-53, 685 P.2d 276 (Idaho 1984). *Utah Power & Light* requires that new rates not go into effect until after a hearing and final decision. *Id.* There is no case law cited by the Staff to support its argument that mere notice is sufficient to satisfy the prohibition against retroactive ratemaking. There is also no explanation from Staff as to why this precedent is inapplicable since both *Utah Power* and the Staff's claims here deal directly with a change to a retail rate. Therefore, if the Commission determines that the price in the Letter Agreement is a retail rate, under Idaho law the Commission may abrogate the Letter Agreement only prospectively from the date of its decision.

The Commission Must Not Act Arbitrarily Or Capriciously.

The Commission must neither abuse its discretion nor act in an arbitrary or capricious manner. *Rosebud Enterprises, Inc. v. Idaho Public Utilities*

Commission, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). Therefore, before the Commission considers abrogating the Letter Agreement, it must ensure it is acting neither arbitrarily or capriciously. In particular, Astaris urges the Commission to carefully consider the following facts demonstrating that abrogation would be arbitrary and capricious:

First, the Commission itself adopted the policy in December 2000 that voluntary load reduction agreements should be encouraged because of the critical issues facing Idaho at that time. Transcript at 89, l. 21 to 90, l. 12. Mr. Hessing agreed that the Letter Agreement is consistent with that Commission and Staff policy. Transcript at 91, l. 10 to 14. Nevertheless, the Staff now recommends that Commission abrogate the Letter Agreement and ignore the fact that the Staff and Commission promoted the policy that led to the Agreement.

Second, the Commission itself adopted the position that the Letter Agreement should be used to benefit ratepayers, not off-system. *See* Order No. 28695, Case No. IPC-E-01-9. If the Commission did not want ratepayers to bear the risks of falling market prices, it could have allowed the Letter Agreement to be used as an off-system resource. In that case, Astaris would receive the full value of the payments under the Letter Agreement. In essence, the only reason Astaris is now at risk of losing over $45 Million is because the Commission and the Staff wanted the benefits of the Letter Agreement to flow to ratepayers, not Idaho Power shareholders. Now, one year later, having appropriated the power for ratepayers, the Staff wants to slash the price paid for that power.

Third, while Mr. Hessing testified that the risks of the wholesale market prices changing should be shared between Astaris, Idaho Power and the other customers, he nevertheless recommends that Astaris alone bear the full financial brunt of the Staff's recommended abrogation. Transcript at 134, ll. 3 to 12; 142, ll. 20 to 23. The Staff ignores a foundational principle of regulation that risks and rewards should travel together.

Fourth, Mr. Hessing acknowledges that the Staff's proposal, if adopted, would result in a contract that would (a) force Astaris to purchase 50 MW of power, (b) prohibit Astaris from using that power, and (c) force Astaris to sell the power back to Idaho Power at a loss comparing the price Astaris receives ($11 Million) and the retail rate Astaris must pay ($17 Million). Transcript at 172, ll. 10 to 16; Staff Exhibit 101. This result is outrageously unjust and Astaris clearly would never have voluntarily agreed to such a deal.

Finally, Astaris believes it would be arbitrary and capricious for the Commission to abrogate the Letter Agreement now that Astaris has undisputedly relied upon the Agreement to its substantial and irreversible detriment. As Astaris said in the beginning of this process, granting Staff's proposal is analogous to the federal government, in the middle of a season, whimsically telling a farmer who was promised at the beginning of the season $1000 a month to not plant his crops that, because the market price was not what the government expected, the farmer would be only be paid $100 a month for the rest of the season. Unfortunately, at that point, the farmer is unable to go back in time to reject the contract with the new price and plant his crops.

To continue the analogy, Staff's justification for the proposal is like the government telling that farmer that the government's actions are justified because if the government continues to pay the farmer the agreed-upon rate, the remaining taxpayers will be paying more in taxes than the current market price of the crop justifies and, besides, the farmer is getting a windfall because he is getting $1000 a month and not planting crops (of course ignoring the profit the farmer could have made had he planted). In the end, all of these arguments are small consolation to the farmer who now has no crops and dramatically reduced income and who never expected a windfall but rather made the straightforward economic decision that he could earn more profit by agreeing to the government's contract than he could planting, harvesting, and marketing his produce.

Each of these undisputed facts suggests that, even putting aside the other legal impediments, adopting the Staff's position would be arbitrary and capricious and, therefore, prohibited by Idaho law.

Abrogating The Letter Agreement Is An Unlawful Collateral Attack And A Violation Of The United States Constitution.

Idaho's prohibition against collateral attacks on final and conclusive orders of the Commission bars the Commission from abrogating the buy-back contract between Idaho Power and Astaris. Idaho Code § 61-625. Further, if the Commission were to abrogate the contract, the Commission also would violate a number of guarantees provided by both the U.S. and Idaho Constitutions. Among the constitutional infirmities of such Commission action would be an

unconstitutional impairment of contract, a violation of Astaris' substantive due process rights, and an unconstitutional taking. However, as these issues are fully briefed in Astaris' Motion to Dismiss and Brief on Commission Authority, Astaris shall not repeat those arguments here.

In Addition To The Constitutional Issues Raised Previously, Abrogating The Letter Agreement Would Also Constitute A Violation Of Astaris' Right To Equal Protection.

Based on the evidence introduced at trial, in addition to the constitutional issues raised in Astaris' Motion to Dismiss, a Commission decision to abrogate the Letter Agreement would violate Astaris' right to equal protection. The Fourteenth Amendment of the United States Constitution provides that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The function of this equal protection clause "is to measure the validity of classifications created by state laws." *Parham v. Hughes*, 441 U.S. 347, 358 (1979).

To satisfy equal protection requirements, a state's classification must be rationally related to a legitimate government purpose. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 457-58 (1988). The Ninth Circuit has held that while this "rational relation" tier of equal protection scrutiny creates a presumption of validity that is deferential to the state's action, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990), a rational relation is not found where an individual has been "singled out to bear

the burden" of the government's objective. *Id.* at 1509. The *Del Monte* court noted that the Supreme Court recognized this type of equal protection claim in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 (1987). *Id.* The court stated:

> In [*Nollan*], the California Coastal Commission had required that a private property owner provide a public easement to the beach as a condition for granting a building permit. The Court noted that, even assuming the legitimacy of the purpose for the requirement, the action might violate the equal protection clause if the property owner were singled out to bear the burden of remedying the problems California sought to correct. The Court stated:
>
> "If the [property owner] were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause."

Id. (quoting *Nollan*, 483 U.S. at 835 n.4). Thus, the Fourteenth Amendment's prohibition against denying equal protection prevents a state from pursuing an otherwise legitimate objective by targeting an individual to bear the burden of remedying a problem affecting a broad segment of the population.

Furthermore, while equal protection claims often relate to discrimination against individuals due to their membership in a vulnerable class, equal protection rights also protect those who are members of no specific class, but are nonetheless discriminated against by irrational government action. This discrimination against a "class of one" is a recognized violation of the Equal Protection Clause. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Supreme Court recognizes that valid claims are brought by a "'class of one,'

where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* Thus, the protection afforded by the Fourteenth Amendment extends to every individual (and corporation[2]) and prohibits "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* (citations omitted).

In singling out the Astaris Letter Agreement for its price modification proposal, Staff applies an unconstitutional double standard. Mr. Hessing conceded on cross-examination that during at least two months in 2001, the cost to ratepayers of the Irrigators' buy-back contracts was $150 per MWh or more while the mid-Columbia market price was below $50 per MWh, creating a differential between contract and market prices in excess of $100 per MWh. Transcript at 117, l. 8 to 120, l. 13. These figures are also confirmed in the Staff's Comments and Decision Memorandum recommending approval of the Astaris load reduction program. Exhibits 210 at 3 and 211 at 3.

For the remaining period of the Astaris contract (April 1, 2002 through March 31, 2003), Mr. Hessing agreed that the price to be paid to Astaris is less than the irrigator price (only $95 per MWh), while the market price benchmark Staff uses for its proposal is roughly $25 per MWh. Transcript at 174, l. 6 to 18; 187, l. 6 to 15. Accordingly, for the remaining contract period now at issue, the Astaris contract price is only $70 per MWh higher than the Staff's market price

[2] The courts have long-recognized that a corporation is a "person" for purposes of the Fourteenth Amendment. *See Metropolitan Life Ins. Co. v Ward*, 470 U.S. 869, 881 n.9. More recently, courts have implicitly found that limited liability companies similarly are afforded equal protection rights under the Fourteenth Amendment. *See Onsite Advertising Services, LLC v. City of Seattle*, 134 F. Supp. 2d1210, 1215 (W.D. Wash. 2001) (discussing the equal protection rights of a limited liability company).

benchmark, considerably smaller than the over $100 differential applicable to the Irrigators' contracts. Mr. Hessing went on to concede that during August and September of 2001 (at the very same time the Commission was already altering another aspect of the Irrigator load program), "there was no recommendation from the Staff or action by the Commission to alter the price being paid to the Irrigators for the load reduction." Transcript at 122, l.11 to 123, l. 4. Singling out Astaris in this manner is impermissible and would violate Astaris' equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution.

Astaris' Subsequent Plant Closure Is Not Legally Significant Under *Agricultural Products*.

The fact that Astaris closed the final furnace at Pocatello does not support a conclusion that the Letter Agreement may be abrogated under *Agricultural Products*. In fact, Mr. Hessing testified that the Letter Agreement did not require Astaris to keep the final furnace operational. Transcript at 108, ll. 20 to 21. Mr. Hessing also agreed that Staff is not claiming that Astaris has acted in bad faith, has done anything improper with regard to the Letter Agreement, or has failed to perform its obligations under the Letter Agreement in any way. Transcript at 142, ll. 5-11.

However, it was clear from the hearing that the issue of plant closure is politically sensitive. It was also apparent that a great deal of Commissioner interest was focused on whether Astaris would be a "free rider" if it knew at the time of the Letter Agreement in March of 2001 that the plant would close before

the end of the two-year term. If any confusion remains on this issue, Astaris wishes to set the record straight:

Astaris' witnesses testified that Astaris did not know it was going to close the last furnace at the time the Letter Agreement was signed. Transcript at 361, ll. 11 to 25; 437, l. 19 to 438, l. 13. Rather, as Ms. McCarvill testified:

> As Astaris was formed and I joined the Company [in 2000] ... the plans were clear that we were going to continue to sell a family of products that require elemental phosphorous, and there was a belief that the Pocatello facility could produce that phosphorous at a price that would be economical and comparable to what it would take us to land elemental phosphorous into the United States from these overseas sites. ... [T]he first plans that I saw for the Company when I joined the Company showed Pocatello ... in operation through 2010.

Transcript at 394, l. 24 to 395, l. 17. In reviewing the record, Mr. Hessing concluded:

> I think there have been several attempts in this case by various parties to identify when Astaris knew that they were going to close their facility. I think some would say that if Astaris knew that they were going to close their facility before they entered into a letter agreement they were a free rider, and maybe there should be some adjustments. In my reading of this case, I have not been able to determine that that is true. It seems that the decisions, as Astaris has identified those, occurred in a stream that were largely -- even though they had a direction to go to the purified wet acid, purified phosphoric acid process, the decision for the closing of the blast furnace, especially, occurred after this letter agreement was entered into. So I'm not sure that, personally, I can reach the point that Astaris is a free rider in this situation.

Transcript at 207, l. 24 to 208, l. 18.

No evidence was entered into the record to refute Astaris' testimony and Mr. Hessing's analysis. Indeed, and perhaps most tellingly, it is undisputed that in February of 2001 Astaris was offered a very favorable contract for a complete

shutdown at Pocatello that Astaris did not accept. Transcript at 362, ll. 4 to 10. If Astaris knew then that it was going to close the Pocatello plant completely, why would it reject this offer? That fact is wholly inconsistent with any allegation that Astaris somehow knew at the time of the Letter Agreement that it intended to close down the Pocatello facility.

While the testimony in the record establishes that Astaris is not a free rider, Idaho Power argued that Astaris has an affirmative obligation to provide documents to substantiate the fact that the plant closure was not known when the Letter Agreement was negotiated. As a preliminary matter, Idaho Power is wrong in assuming that Astaris has the burden of proof in this proceeding. That burden is clearly on the Staff. Further, in response to discovery Astaris has provided such documents to Staff on a confidential basis. Despite having every opportunity to sign an appropriate nondisclosure agreement, Idaho Power has declined the opportunity to review those documents. As Astaris offered at the hearing, if the Commission wishes to review the documents or believes that additional evidence is warranted, Astaris would be pleased to provide, in a supplemental filing or hearing, whatever information the Commission requires, subject to appropriate confidential treatment of any documents.

Ultimately, the unsubstantiated allegations and innuendos offered by Idaho Power are not evidence. Idaho Power elected not to put on any evidence to support its allegations and innuendos but, rather, chose to attack the Astaris witnesses personally by insinuating that Astaris has been manipulating this process and that Idaho Power is simply an innocent bystander with no culpability

for the high prices of power currently paid by Idaho ratepayers. In the end, Astaris and Staff offered the only evidence into the record on this issue, all of which supports the conclusion that Astaris did not know before it signed the Letter Agreement that it would close the last furnace in late 2001. Unsubstantiated innuendo from Idaho Power is at best pure speculation.

WHEREFORE, Astaris respectfully requests that the Commission honor and uphold the Letter Agreement and reject the request by Staff to undo the contract midstream.

Dated this 8th day of March 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of March 2002, a true and correct copy of the foregoing Reply Brief on Motion to Dismiss and Commission Authority was e-mailed and sent by first class mail, postage prepaid, to the following:

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